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Order 2001-5-11



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 11th day of May, 2001

**SERVED: May 11, 2001**

**In re**

**COMPLIANCE WITH U.S. CITIZENSHIP  
REQUIREMENTS OF DHL AIRWAYS, INC.**

**Third Party Complaint of Federal Express Corp.  
Pursuant to 14 CFR 302.404**

**Docket OST 2001-8736 - 8**

**In the Matter of**

**COMPLIANCE WITH U.S. CITIZENSHIP  
REQUIREMENTS OF DHL AIRWAYS, INC.**

**Third Party Complaint of United Parcel Service Co.  
Pursuant to 14 CFR 302.404**

**Docket OST 2001-8824 - 3**

**ORDER DISMISSING THIRD-PARTY COMPLAINTS**

By this order, we dismiss the third party complaints against DHL Airways, Inc. (DHL Airways) filed by Federal Express Corporation (FedEx) in Docket OST 2001-8736 on January 19, 2001, and by United Parcel Service Co. (UPS) in Docket OST 2001-8824 on January 30, 2001.

FedEx and UPS allege that after a proposed corporate reorganization, foreign nationals, including DHL International, Ltd. (a Bermuda corporation), Deutsche Post (the operator of Germany's national post office), and Lufthansa Cargo AG (a German airline) control or have the opportunity to control the operations of DHL Airways. They allege that DHL Airways is a foreign citizen or controlled by foreign citizens because its ultimate owner is a foreign citizen and because it is

part of a worldwide network dominated by foreign citizens. The two carriers request the Department to conduct a formal enforcement investigation under 14 CFR Part 302, Subpart D, into DHL Airways' compliance with the statutory requirement that all U.S. air carriers be U.S. citizens.<sup>1</sup>

On February 5 and 14, 2001, respectively, DHL Airways filed answers opposing the two complaints and requesting that they be dismissed. In its answers, DHL Airways states that it is and will remain in compliance with all citizenship requirements and that there is no basis for the institution of an enforcement proceeding. The carrier states that it has provided the Department with information and documents concerning its corporate reorganization to demonstrate that all citizenship and continuing fitness standards have been met. It further argues that the application of the Department's continuing fitness procedures to the issues raised by FedEx and UPS is far more appropriate than would be their consideration in an enforcement proceeding. Therefore, it urges that the complaints be dismissed. FedEx and DHL Airways filed further responsive pleadings reiterating their positions.<sup>2</sup>

Pursuant to 49 U.S.C. 41102, DHL Airways and other companies may hold certificates to engage in air transportation only if they are found to be citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section requires that the president and two-thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. In addition to meeting these specific numerical standards, the Department has also long interpreted the statute to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

We dismiss the complaints of FedEx and UPS, and we do so without reaching their merits. The Department has for some time been conducting a review of the citizenship of DHL Airways that deals directly with the issues raised by the complaints within the context of an informal continuing fitness review proceeding. That review predates the complaints in these dockets and it would be inappropriate to now begin dealing with the matter in an enforcement context. The material presented here by FedEx and UPS will, however, be considered in the context of that informal review. The Department's consideration of this matter is consistent with its long-standing policy to review citizenship questions of cooperating air carriers informally as part of its monitoring of carrier continuing fitness rather than through an enforcement proceeding or other formal proceeding, particularly where the continuing fitness

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<sup>1</sup> 49 U.S.C. § 41102.

<sup>2</sup> On February 14, 2001, FedEx filed a Reply accompanied by a Motion to File an Otherwise Unauthorized Document. On February 26, 2001, DHL Airways filed an answer to FedEx's Reply and Motion Reply accompanied by a Motion to File an Otherwise Unauthorized Document. On March 9, 2001, FedEx filed Comments accompanied by a Motion to File an Otherwise Unauthorized Document. DHL Airways filed an Answer accompanied by a Motion to File an Otherwise Unauthorized Document on March 9, 2001. On May 3, 2001, FedEx filed additional comments accompanied by a Motion for Leave to File an Otherwise Unauthorized Document. We shall grant each of these motions and accept the pleadings.

review is already underway. DOT Orders 93-7-25 and 91-12-51.<sup>3</sup> Therefore, the matter at issue in these pleadings is properly the subject of that informal review and institution of a formal enforcement proceeding as requested at this time would not be appropriate or in the public interest.

ACCORDINGLY,

1. We dismiss the third-party complaints of Federal Express Corporation in Docket OST 2001-8736 and of United Parcel Service Co. (in Docket OST 2001-8824) without prejudice; and
2. We grant the Motions to File Otherwise Unauthorized Documents filed by Federal Express Corporation and DHL Airways, Inc.

This order is issued under authority assigned in 14 CFR 302.406 and shall be effective as the final action of the Department within 30 days after service.

By:

Samuel Podberesky  
Assistant General Counsel for  
Aviation Enforcement and Proceedings

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<sup>3</sup> Although Order 93-7-25 reflects an enforcement settlement with the carrier involved stemming from a third-party complaint, the investigation that led to that settlement was informal in nature. Also see Consent Order 89-9-51, p.2, n.2, regarding the Department's policy on issuing orders at the conclusion of informal continuing fitness reviews.